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Supreme Court of the United States

OCTOBER TERM, 1954.

No. 302

UNITED GAS PIPE LINE COMPANY,
Petitioner,

versus

FEDERAL POWER COMMISSION and MISSISSIPPI RIVER FUEL CORPORATION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioner prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit entered on March 25, 1955 (R. 159) affirming the Judgment and decisions of the Respondent, Federal Power Commission (the Commission), entered in Docket Numbers G-2024 and G-2097 against petitioner (R. 117) which would require Petitioner, United Gas Pipe Line Company (United) to record on its books certain accounting adjustments applicable to the commodity charge for gas purchased by Mississippi River Fuel Corporation (Mississippi) in the total sum of $2,836,293.43.

OPINIONS BELOW.

The opinion of the Court of Appeals is reported in 220 F. 2d 706 and appears on Page 159 of the record. The opinion and order of the Federal Power Commission, concurred in by three Commissioners is unreported and is set out at Page 117 et seq of the record. The dissenting opinion of two dissenting Commissioners appears at Page 120 et seq of the record.

JURISDICTION.

The Judgment of the Court of Appeals was entered on March 25, 1955. Timely application for rehearing was filed and over-ruled by the Court on May 12, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1) 62 Stat. 928 and Sec. 19 (b) of the Natural Gas Act—15 U.S.C. 717 r, 52 Stat. 831.

QUESTIONS PRESENTED.

1. A contract between two natural gas companies for the purchase and sale of gas contains provisions for changes in rates in the event of contingencies, and the order of the Federal Power Commission permitting the contract to take effect as a rate schedule specifically provides that no rates other than those specifically provided for in the contract shall be charged except upon the filing of any proposed changes as required by the

Natural Gas Act and the Commission's regulations thereunder. In these circumstances, may the Commission disregard these terms of the aforesaid order approving the filed rates and disregard its own rules and regulations, and require by subsequent order in an investigative proceeding changes in the established rates without regard to the procedural or substantive provisions of the Natural Gas Act, particularly when it does not find that the established rates are unjust, unreasonable or otherwise violative of the standards of the Act and does not find that the ordered changes result in just and reasonable rates?

2. In a proceeding in which an order of investigation of the Federal Power Commission, if authorized by law, can only serve as an ancillary power to its jurisdiction over rates, can the Commission order a change in rates while specifically disavowing and refusing any consideration as to whether its action results in just and reasonable rates?

3. In such a case, can the Federal Power Commission in any event order a retroactive change in rates?

STATUTE INVOLVED.

The pertinent provisions of the Natural Gas Act, 52 Stat. 821, 15 U.S.C. 717 *et seq.*, and of the regulations of the Commission thereunder are set out in the Appendix to this brief, *infra* pages 21-24

STATEMENT OF THE CASE.

United (and its predecessor companies) has for many years been engaged in the purchase, transportation and sale for resale of natural gas produced in the Gulf South area. Mississippi has been engaged primarily in the purchase of gas in this area for transmission and sale at retail and wholesale in the St. Louis area and along its right-of-way enroute. United has supplied gas to Mississippi since 1929 pursuant to contract. Since the enactment of the Natural Gas Act, the relationship between the companies, both of which are natural gas companies within the meaning of the Act, has been subject to the continuing jurisdiction of the Commission. (R. 63.)[1]

In September 1945, in contemplation of Mississippi's increased requirements of gas in the St. Louis area and elsewhere, the contractual relationship between the companies was overhauled and an amendatory agreement was negotiated. Its principal features, as related to the present controversy, are contained in Article 4 and 6. This contract is filed with the Commission as Supplement No. 11 to Rate Schedules F.P.C. Nos. 9, 10 and 11. (App. 131-138.)

Article 4 is premised upon Mississippi's immediately foreseeable peak requirements of gas then estimated at 73,000 Mcf/day. The basic terms of sale are a demand

[1] References to the Transcript of Record are abbreviated (R), while references to the Joint Appendix are abbreviated (App.)

charge of 38 cents/Mcf and a commodity charge of 5 cents/Mcf.[2]

Article 6 reflects the circumstance, quite general throughout the industry at that time, that demands for natural gas, present and potential, appeared to be outrunning management's ability to make firm and valid estimates. Accordingly, Mississippi was given wide latitude to increase the demands which it could make upon United and United assumed a corresponding obligation to meet these demands. (App. 134.) In the context of the valuable privilege thus accorded to Mississippi and the onerous obligations thus assumed by United, the last paragraph of Article 6 is necessarily of paramount importance to United. It provides:

> "For such increased quantities of gas the price provided for in this agreement shall be adjusted by appropriate revision of the Demand and Commodity Charge, respectively, to compensate Seller for all of Seller's increased cost resulting from such increased capacity." (App. 135.)

In March of 1949, pursuant to Article 6, Mississippi notified United of its intention to increase its take from United from 40 percent to 65 percent of its requirements, which had in the meantime risen sharply, so that United was required to provide capacity to deliver up to 195,000 Mcf of gas per day, more than 2½ times the then prevailing maximum. (App. 139.) Mississippi at the same

[2] A commodity charge is the unit price of gas per Mcf as applied to the volume of gas delivered during the billing period. A demand charge is a charge based upon the capacity made available to the buyer, usually measured by the volume taken on a single day which is higher than the volume taken on any other day during a specified period, usually 12 months.

time recognized that United would have to expand the capacity of its Carthage-Monroe Line and, in accordance with the terms of the 1945 contract, undertook to advance up to $1,500,000, as might be required by United. (App. 137.)

The negotiations resulted in an Amendment to the 1945 gas supply contract which was concluded on November 16, 1949, and was filed with the Commission as Supplement No. 15 to Rate Schedule FPC Nos. 9, 10 and 11. It provided specifically for the elimination in *toto* of Article 4 of the contract of September 1945, and provided in its stead a demand charge of 45 cents/Mcf and a commodity charge of 6½ cents/Mcf.[3] (App. 139-144.) Article 6 of the agreement was not disturbed.

Contemporaneously with the filing of the foregoing agreement as Supplement No. 15 to United's rate schedules, United and Mississippi entered into a letter agreement dated November 16, 1949, which was filed with the Commission and designated as Supplement No.

---

[3] The text of the new agreement was as follows:

"From and after the effective date hereof, the price to be paid by Buyer to Seller for all gas deliverded by Seller to Buyer (including the increased quantities of gas resulting from Buyer's above-mentioned notice dated March 28, 1949) under said Gas Sales Agreement, as heretofore amended, and as herein amended, shall be determined in accordance with the provisions of this Article 2, in lieu of the provisions of Article 4 of the above mentioned amendatory agreement dated September 7, 1945, between Seller and Buyer; and effective from and after effective date hereof, said Article 4, in its entirety, shall be and is hereby canceled and superseded by the following provisions, to-wit:

"The price for such gas delivered during any billing month shall consist of a Demand Charge and A Commodity Charge.

"Demand Charge: $0.45 per Mcf of Billing Demand per month.

"The Commodity Charge: 6.5¢ per Mcf for all gas delivered during any billing month." (App. 141.)

1 to Supplement No. 15 to Rate Schedules FPC Nos. 9, 10 and 11. This supplement reads in part as follows:

> "It is anticipated that the additional gas requested by Mississippi River Fuel Corporation by letter dated March 28, 1949, must be supplied by United Gas Pipe Line Company from purchases of surplus gas in the Carthage Field. United is entering into purchase contracts for the purchase of this surplus gas. These purchase contracts are for twenty (20) years, and the price to be paid thereunder is on a sliding scale of 7-½¢ per Mcf for the first 5-year period, increasing one cent each 5 years to 10-½ cents for the final 5-year period.
>
> "Due to the variations in the market demands of both United and others now withdrawing gas from Carthage Field, the amount of surplus gas purchases may, in any year, be less than the amount estimated by United to supply the increased requirements of Mississippi River Fuel Corporation. It is the intention of United, as of March 1st of each year, to make an appropriate adjustment in the commodity charge as set out in its amendatory agreement with Mississippi River Fuel Corporation dated November 16, 1949, in the event that the surplus gas purchases, chargeable to Mississippi River Fuel's increased demand as set out in said agreement, shall be less than 122/195 of Mississippi River Fuel's total requirements from United. The amount of the adjustment, and the method of calculation, shall be approved by the Federal Power Commission."

It was assumed by all parties that the Carthage Field would be the principal gas source, that United's allowable withdrawals from this field would be insufficient to

meet Mississippi's requirements, and that other producers' surplus gas would be available to United initially, at the rate of 7-½ cents/Mcf, in an amount sufficient to make up this deficiency. On the other hand, however, United had no definitive commitments for surplus gas from any producers in the Carthage Field, either at the time the Commission granted a certificate of convenience and necessity for expansion of the facilities serving Mississippi, or when the Commission, by its Order dated December 20, 1949, permitted Supplement No. 15 to become effective as a rate schedule (App. 171). The record is barren of any suggestion on the part of Mississippi that Carthage Field gas was for any reason to be preferred over gas from other sources, and none of United's contracts with Mississippi contain any provisions precluding the introduction of non-Carthage Field gas. In fact Mississippi considered the rate offered by United to be the "best bargain in the gas business."

In addition to the provisions of Supplement No. 1 relating to readjustment of the commodity charge as a result of unanticipated gas purchases, Supplement No. 15 also embodied a tax cost adjustment provision wherein Mississippi agreed to reimburse United for additional taxes or increases in taxes and periodic changes providing for a higher gas price in succeeding 5-year periods. (App. 141, 143.) The order of the Commission accepting Supplement No. 15 and Supplement No. 1 to Supplement No. 15, issued December 27, 1949 contained specific recitals concerning the tax adjustment clause providing for "future adjustments in the schedules of rates and charges which are made effective by this order," and the pro-

visions of Supplement No. 1 to Supplement No. 15 providing that United will make an adjustment in the commodity charge as of March 1 of each year. The order contained a provision with respect to both such adjustments that (App. 167):

> "***United before making, demanding, or receiving any charge or charges for natural gas different from those provided for in the present schedules of rates and charges to be made, demanded and received under these rate schedules, shall file such changes as required by the Natural Gas Act and the Commission's regulations thereunder which were in effect next prior to December 1, 1948."

With respect to the invoking of the purchased gas cost adjustment the Commission ordered additionally (App. 167):

> "United shall file as of March 1 in each year the amount of the proposed adjustment in the commodity charge, referred to in said Supplement No. 1 to Supplement No. 15, the method of calculation of such adjustment, and such other details as may be requested by the Commission, and such filing shall be made each year whether or not any adjustment is contemplated by United."

The facilities required for the expanded service to Mississippi were put in operation in the Fall of 1949. As it transpired, however, United was unable to conclude contracts for the purchase of Carthage Field surplus gas at 7½¢, but it was nonetheless able to satisfy Mississippi's requirements out of alternative sources. For the period terminating February 28, 1950, United was able to pro-

cure gas upon terms no more disadvantageous to it than its basic contracts in the Carthage Field which had, prior to the execution of Supplement No. 15, been the basis for the 5-cent commodity rate specified in Rate Schedule FPC Nos. 9, 10 and 11. Accordingly, on May 23, 1950, United filed with the Commission a proposal to reduce its commodity charge to Mississippi for the period ending May 28, 1950 by $201,900 and to make refund to Mississippi in that amount. (App. 168.) In due course the Commission, treating United's filing as a filing of a new rate schedule under Section 4 (d) of the Act for the period involved, entered an order permitting this rate schedule to take effect retroactively to December 13, 1949 (the date of first delivery under the supplemental contract) and approving the rate as modified pursuant to Section 4(d) of the Act. (App. 171.)

During the year ending February 28, 1951, United was unable to continue the advantageous gas purchases effected in the prior period and, Carthage Field surplus gas continuing to be unavailable, it concluded other arrangements for the supply of Mississippi's increasing requirements through gas purchases made on a basis of 7-½ cents per Mcf. When United proposed an adjustment in rate for the year ending February 28, 1951, it sought credit for the increased cost of purchased gas. But this proposal was denied and rejected by the Commission on the sole ground that this was not equivalent to surplus gas purchased in the Carthage Field. (App. 155.) In view of the Commission's refusal to consider a reasonable basis for the adjustment United failed and refused to make any further adjustments in its rates.

Mississippi then filed a complaint in Docket G-2024 against United requesting that the Commission require United to comply with its rate schedules and to make appropriate adjustments in its commodity charge for gas sold to Mississippi. (R. 3.) Thereafter the Commission issued its order of investigation (F.P.C. Docket No. 2097) directed to United for the stated purpose

> "of enabling the Commission to determine the correct amount of adjustment in the charges of United to Mississippi for natural gas sold and delivered during the 12-month periods ended February 28, 1951, and February 29, 1952, under the provisions of United's Rate Schedules FPC Nos. 9, 10 and 11 and as may be due and payable from United to Mississippi for each of said 12-month periods." (R. 22.)

Mississippi's complaint was consolidated for the purpose of hearing with the Commission's order of investigation.

The matter was heard by a Trial Examiner who rendered an opinion, subject to review by the Commission, granting the relief sought by Mississippi. (R. 51-72.) During the trial before the Examiner, United sought to introduce evidence as to the reasonableness of its approved commodity rate and of any change or adjustment therein which evidence was rejected by Examiner. The record does however contain evidence, unobjected to, which discloses that in 1951 United was paying from 7 to 9-½¢ per Mcf for gas supplied to Mississippi (App. 65).

The intermediate decision of the Examiner was approved by the Commission with the statement:

> "The question of the reasonableness of United's rates is not now before us and may not be considered by us in this case. We are now only performing the duty given to us by Supplement No. 1 to Supplement No. 15." (R. 119.)

Two of the five Commissioners filed a dissenting opinion in which they stated:

> "We consider it unreasonable to require United to supply the additional . . . gas at the original rate of the commodity charge of 5-cents per Mcf when such gas is actually costing United 7-½ cents per Mcf. We believe that there is a responsibility on the Commission in providing for a reasonable accounting adjustment to fix a fair and reasonable rate for this additional gas regardless of whether or not it is a surplus gas from the Carthage Field or purchased by United from other fields." (R. 125.)

In substance, the order of the Examiner which was adopted by the Commission provides for a retroactive adjustment applicable to the commodity charge for gas purchased by Mississippi from United in the aggregate sum of $2,836,293.43; and directed that within thirty days United shall file an accounting adjustment showing an aggregate adjustment applicable to such commodity charge. (R. 72.)

United filed a timely petition for a review of the Commission's order by the Court of Appeals for the Fifth Circuit in accordance with the provisions of Section 19(b)

of the Natural Gas Act. The Court of Appeals sustained the Commission and denied United's petition to vacate the Commission's order. (R. 159.)

REASONS FOR GRANTING THE WRIT.

The issues in this case present important federal questions which have never been decided by this Court. Since these questions relate to fundamental concepts and procedures in rate making in the sixth largest industry, serving twenty-eight million customers including domestic, commercial and industrial users, the decision of the Court will affect the national interests in a broad and important field.

We are here dealing with a situation involving approved rate schedules on file with the Commission with respect to which schedules the Commission in its approving order reserved the right to re-examine the commodity charge for natural gas forming a part of the rate schedule at the end of each year. In making such reservation, the Commission could not cut across or evade the statutory pattern of regulation set out in the Natural Gas Act. Rates filed and approved by the Commission are subject to change solely by two methods, by a filing under Section 4 (d) by the Company or by a proceeding instituted by the Commission under Section 5 (a). In this case the Company's filing was rejected by the Commission leaving as the only method of changing the rate, a Section 5 (a) proceeding by the Commission, a proceeding specifically re-

quiring a finding of reasonableness.[4] Before the rate could be changed in the circumstances outlined above, the Commission was required to inquire into and find that the rate as changed, modified, or adjusted, whichever terminology is used, was fair and reasonable. In these respects, the Commission completely ignored its statutory duty of which it could not relieve itself by its own self-imposed limitation. And the requirement that the Commission shall fix just and reasonable rates as directed in Sections 4 and 5 of the Natural Gas Act is, as stated by this Court, "the heart of the regulatory system."[5] The right to a hearing in accordance with the procedures outlined in the Act is a minimal requirement of due process of law.[6]

The substantive issue which lies at the core of the controversy is the question whether United's charges to Mississippi were just and reasonable, yet this is the issue which the Commission seeks to dispel by it ipse dixit, "The question of the reasonableness of United's rates is not now before us and may not be considered by us in this case." (R. 117.) Although it is the minority's disagreement with this very proposition which bottoms the

[4] In a proceeding under Section 5 (a) of the Natural Gas Act "The first pre-requisite to an order by the Commission is that it shall be preceded by a hearing and findings" that the rate is unjust, unreasonable, unduly discriminatory or preferential—F.P.C. v. Nat. Gas Pipe Line Co., 315 U.S. 575, 583, 86 L.ed 1037, 1048.

[5] Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591, 611, 64 S.Ct. 281, 88 L.ed. 333, 349.

[6] R. R. Commission v. Pacific Gas & Elec. Co., 302 U.S. 388, 393, 58 S.Ct. 334, 82 L.ed. 319, 322; Denver Union Stock Yard Co. v. U. S., 304 U.S. 470, 475, 82 L.ed. 1469, 1475. Moreover the minimal requirements of fair play made a full hearing upon the issues of fairness and reasonableness necessary in view of the fact that in an unrelated proceeding to which the Commission and Mississippi were parties and United was not, the Commission fixed and predetermined United's liability four months before the Commission issued its order of investigation. In Re. Miss. River Fuel Corp., 95 PUR (NS) 435, 449-451 (June 1952).

dissenting opinion, the majority offers no explanation for this self-imposed impotence in an area in which the Commission has been afforded the widest regulatory duties and powers by legislature and court.

Furthermore, the Commission customarily cites the authority for its orders of investigation as required by the Administrative Procedure Act; yet the order in this case is silent as to the legal authority and jurisdiction under which the Commission was proceeding. The Commission's order of investigation was restricted in its terms to determination of "the correct amount of the adjustment in the charges" and to a determination of "such amount as may be due and payable from United to Mississippi." Obviously, any investigation by the Commission in this case should have been directed to a consideration of all factors including the basic contract obligations and rights of United and the various supplements thereto, revelant to the reasonableness of the charges or any adjustment thereof which would compensate United for its increased costs in supplying Mississippi's increased requirements.

United's Rate Supplement No. 15 fixes the commodity rate for gas delivered to Mississippi under its contract with United at 6-½¢ per Mcf. (App. 141.) Supplement No. 1 thereto specifies no rate whatsoever. (App. 149.) This 6-½ cent rate is therefore the only lawful rate that United can collect, and it must be charged and collected until changed by proper proceedings initiated by United under Section 4 (d) of the Act, or as a result of an investigation by the Commission under Section 5 (a) of the

Act.[7] In the instant case, the Commission has specifically denied such a character to the proceedings, both in limine when it set the matter for hearing and in its findings, opinion and order.

When United proposed an adjustment of the 6-½ cent rate pursuant to its statement filed on May 19, 1950, the Commission treated the filing as a rate schedule under Section 4 of the Act, and, in accordance with its rules, duly designated it as Supplement No. 1 to Supplement No. 1 to Supplement No. 15. (App. 168.)

However, with respect to the adjustment proposed on April 24, 1951 the majority of the Commission chose to disregard the guide-posts which the Commission had itself previously set for passing on United's filings pursuant to Supplement No. 1. (App. 155.) Since the Commission, in acting upon a filing by a company under Section 4, is empowered not only to accept or reject the rate proposed in the filing, but is free also, if the facts warrant to establish a different and lower rate from that proposed by the company, the Commission in this instance, deliberately evaded its duty to fully and definitely dispose of the adjustments called for under Supplement No. 1 within the framework provided by the Act.

Although the Commission gave no specific reason for its inability to consider the reasonableness of the commodity rate, the Court of Appeals apparently based its

[7] Hope Natural Gas Co. v. Federal Power Commission, 134 F. 2d 287, L. & N. Ry. Co. v. Maxwell, 237 U.S. 94, 35 S.Ct. 494, 59 L.ed. 853, Montana-Dakota Utility Co. v. N.W.P.S. Co., 341 U.S. 246-251; Midland Realty Co. v. Kansas City P. & L. Co., 300 U.S. 109; Miss. Power & Lt. Co. v. Memphis Nat. Gas Co., 162 F. 2d 388.

decision on the proposition that the anticipated annual adjustments referred to in Supplement 1 to Supplement 15 were part and parcel of United's Rate Schedules and that the case therefor involves only a matter of interpreting such rate schedules. In reaching this conclusion both the Commission and the Court of Appeals have disregarded the provisions of Section 154.38 (d) (3) of the Commission's Rules and regulations promulgated under the authority of the Act. This Section of the Rules and Regulations is set out in full in the Appendix to this petition (*Infra* page 24). The Commission's Rules have the force and effect of the law.[8]

Section 154.38 (d) (3) specifically states that a gas cost adjustment provision like that contained in Supplement 1 is no part of a rate schedule and can only be made operative by subsequent independent proceedings as required by the Act. This rule further provides that such a provision can only be considered as a part of a service agreement that it will be the privilege of the company under certain specified conditions to propose a modification or change of its effective rate or charge, but that such a clause cannot effect a change in the rate except in the manner provided in Section 4 of the Act. Supplement No. 1 furnished the Commission with the basis for continuous supervision over United's charges through its order requiring an annual filing which could be considered by the Commission as a filing under Section 4 of the Act. This was precisely the view of the Commission with respect to United's initial filing which resulted in the remission of $201,893. However, through

[8] Columbia Broadcasting Co. vs. U. S., 316 U.S. 407, 62 S.Ct. 1194, 86 L.ed. 1563; A.T. & S.F. Ry. Co. vs. Scardett, 300 U.S. 471, 57 S.Ct. 541, 81 L.ed. 748.

the use of the investigative procedure, the Commission evades the statutory requirements of finding the reasonableness of the charges in the light of all of United's undertakings and its right to be compensated for additional costs incurred in furnishing increased quantities of gas to Mississippi. It is significant that the Commission could not find a basis in law for its indefensible action and in this case studiously refrained from following its customary procedure of specifying the provisions of law under which it was proceeding.

Even if the Court and the Commission were right in considering the agreement for periodic future adjustments as a part of the rate schedule the provisions of Sections 4 and 5 of the Natural Gas Act are also part and parcel of the rate schedule, and the agreement must be interpreted in the light of the law applicable thereto.[9]

Furthermore the Commission, having consistently followed its rule that contract provisions for periodic adjustments in rates shall not be considered, as any part of a rate schedule and can only be put into effect by following the procedure of Section 4 of the Act, cannot ignore its rules and establish some special procedures for this particular case.[10] See *American Tel. & Tel. Co. vs.*

[9] F & M Bank v. Federal Reserve Bank, 262 U.S. 649, 660; 43 S.Ct. 651, 67 L.ed. 1157, 1164; Home Building & Loan Association v. Blaisdell, 290 U.S. 398, 435, 78 L.ed. 413, 427.

[10] The order of the Commission approving Supplement 15 and Supplement No. 1 thereto contains in paragraph (A) the following proviso: (App. 167):

"Provided however, that United before making, demanding, or receiving any charge or charges for natural gas different from those provided for in the present schedules of rates and charges to be made, demanded, and received under these rate schedules, shall file such changes as required by the Natural Gas Act and the Commission's regulations thereunder which were in effect next prior to December 1, 1948."

U. S., 299 U.S. 232; 241, 57 S.Ct. 170; 81 L.ed. 142, 150; *Columbia Broadcasting System v. U. S.*, 316 U.S. 407, 62 S.Ct. 1194, 86 L.ed. 1563; *Thompson vs. Spear*, (C.A. 5) 91 F.2d 430, Cert. Den. 302 U.S. 762.

In this connection the Court of Appeals has not followed its prior rulings respecting the activation of "escalator" clauses for changes or adjustments in established rates. In the case of *Mississippi Power and Light Company vs. Memphis Natural Gas Company*, 162 F. 2d 388, the Fifth Circuit Court held that such clauses can only be made effective by a filing by the gas company under Section 4 of the Act. Failure of the company to act would justify the Commission in proceeding under Section 5 to determine the reasonableness of the existing rate. This "intra circuit conflict" is an additional basis for certiorari.[11]

CONCLUSION.

The public interest requires a strict adherence to the principles and the procedures laid down in the Natural Gas Act. The tests of reasonableness in rate making and the procedures to be followed in the making of rate changes must be complied with by the regulatory agency to avoid injustice, uncertainty and confusion. Stability of practice and principle must be maintained in this important field of administrative law so that the public

[11] Dickinson v. Petroleum Conversion Corp. 338 U.S. 507; 70 S.Ct. 322; 94 L.ed. 299; John Hancock Ins. Co. v. Bartels, 305 U.S. 180, 181; 60 S.Ct. 221 84 L.ed. 176.

and the industry may have well defined guide posts for future planning and action. Petitioner submits that there has been such a departure from these practices and principles by the respondent as to require a review of the Commission's action in this case. For the reasons assigned this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX.

NATURAL GAS ACT June 21, 1938, c. 556, Sections 4 and 5 (a) 52 Stat. 822, 15 U.S.C. 717 c, 717 d.

Section 4.

(a) All rates and charges made, demanded or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from June 21, 1938) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any

manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would

otherwise go into effect: Provided, That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. . . .

Section 5.

(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: Provided, however, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance

with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowerst reasonable rates.

FEDERAL POWER COMMISSION, GENERAL RULES AND REGULATIONS—18 C. F. R. 154, 38 (d) (3)

Section 154. 38 (d) (3).

No Rule, regulation, exception or condition such as tax, commodity price index, wholesale price index, purchased gas cost adjustment clauses or other similar price adjustments or periodic changes shall be included in the rate schedule or any other part of the Tariff which in any way purports to effect a modification or change of any rate or charge specified in the rate schedule, or the substitution therefor of any other rate or charge: Provided, however, a natural-gas company may state in the service agreement or in rate schedules filed pursuant to Section 154.52 that it is or will be its privilege, under certain specified conditions, to propose to the Commission a modification, change or substitution of the then effective rate or charge: Provided further, that no such clause may effectuate a change in an effective rate or charge except in the manner provided in Section 4 of the Natural Gas Act, as amended, and these regulations. (Emphasis Supplied.)

PROOF OF SERVICE.

I, W. Scott Wilkinson, one of the Attorneys for United Gas Pipe Line Company, petitioner herein, and a member of the Bar of the Supreme Court of the United States hereby certify that on the .... day of August 1955, I served copies of the foregoing petition for Writ of Certiorari to the Supreme Court of the United States on the several parties thereto, as follows:

1. On the Federal Power Commission by mailing copies in a duly addressed envelope with Air Mail postage prepaid to the Solicitor General, Department of Justice, Washington 25, D.C. and to Williard W. Gatchell, General Counsel, Federal Power Commission, Washington, 25, D.C.

2. On Mississippi River Fuel Corporation, Intervening Defendant, by mailing a duly addressed envelope with Aid Mail postage prepaid to their attorneys of record, William A. Dougherty and James Lawrence White, 30 Rockefeller Plaza, New York 20, New York.

.....

W. SCOTT WILKINSON,
P. O. Box 1707,
Shreveport, Louisiana.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 14,985

UNITED GAS PIPE LINE COMPANY,
Petitioner,

versus

FEDERAL POWER COMMISSION
Respondent.

Petition for Review of Order of the Federal Power Commission, Washington, D. C.

(March 25, 1955.)

Before HOLMES and BORAH, Circuit Judges, and DAWKINS, District Judge.

DAWKINS, District Judge: United Gas Pipe Line Company (called United) seeks review of an order of respondent, Federal Power Commission (called Commission), requiring petitioner to pay Mississippi River Fuel Corporation (called Mississippi) $2,836,293.43 found to be due under rates filed with the Commission by United.

The proceeding arises under Section 19(b) of the Natural Gas Act of June 21, 1938, chapter 556 (52 Stat. 821) and U.S.C. Title 15, Sec. 717r and Section 10 of the Administrative Procedure Act of June 11, 1946, chapter 324, (60 Stat. 237) U.S.C. Title 5, Sections 1001-1011.

Petitioner is engaged in the transportation and sale of natural gas in interstate commerce in the states of Texas, Louisiana, Mississippi, Alabama and Florida, and Mississippi operates a pipe line from the Louisiana and Texas gas fields to St. Louis, Missouri, supplying consumers en route as well as in said city and surrounding areas.

The proceedings before the Commission originated by a "petition for relief" filed by Mississippi on August 4, 1952 (Docket No. G-2024) seeking to compel United to "make such accounting or render such report or reports as will indicate as of March 1, 1951, and March 1, 1952," proper amounts in the commodity charges for gas purchased by Mississippi from United during said periods in compliance with its rates filed with the Commission. Mississippi alleged that due to the "absence of positive and definitive action and decision" by the Commission "Mississippi is not in position to pursue any legal remedy it may have against United to recover any amounts due therefrom or to determine whether in fact any amounts are due from" United. On September 5th following, United filed a motion to dismiss said petition on the ground that there was then pending before this Court (No. 13,958) a proceeding in which United was seeking review of an order of dismissal by the Commission of its own petition (United's No. G-1804 hereafter referred to) for a declaratory order that it, United, owed Mississippi nothing; that Mississippi had intervened therein

and every issue raised by Mississippi's proceeding (Docket No. 2024) before the Commission would be settled thereby. United prayed that Mississippi's petition for relief in said No. 2024 be dismissed, and in the alternative, stayed until a decision by this Court of the issues in said case No. 13,958.

On December 5, 1952, the Commission issued its order (Docket No. 2097) of its own motion for an investigation to enable it to determine "the correct amount of the adjustment in the charges of United to Mississippi for natural gas sold and delivered" during the said twelve-months periods ending March 1, 1951 and March 1, 1952.

The two proceedings, Nos. 2024 and 2097, were consolidated for the purposes of hearing, and on December 5, 1952, the Commission set a hearing for January 26, 1953, and ordered United to submit "in writing and under oath" ten days prior thereto the volume of gas delivered to Mississippi during the periods involved, the prices paid therefor and the amount, if any, of "surplus gas purchased in the Carthage Field." United complied by filing the affidavit on January 15, 1953, giving the information required and disclosing only a small amount of gas had been delivered from the Carthage Field. It also filed its motion to dismiss the consolidated proceedings for many of the same reasons as stated in No. 2024 above and for the further reason that Commission's No. G-2097 did not conform to the requirements of the Administrative Procedure Act in that it failed to disclose authority and jurisdiction for the investigation. This motion also set forth in considerable detail what had been

done by the parties and the Commission prior to the proceedings before the latter.

The facts are not seriously disputed and, insofar as this controversy is concerned, will be confined to the period beginning September 7, 1945. On that date United and Mississippi entered into a contract designated in the Commission's files as Supplement No. 11 to United's Rate Schedule FPC No. 9, 10 and 11 for the sale by United to Mississippi of a maximum of 73,000 Mcf per day of natural gas at a two-part rate consisting of a demand charge of 38¢ per Mcf per Billing Month, and a commodity rate of 5¢ per Mcf (Article 4 of said contract): The contract further provided that Mississippi should have the right to increase its requirements in such amount as it might specify on or before May 1st of any year, delivery to begin November 1st of the year in which said notice was given and to continue until November 1st, 1966, "x x x provided Seller had on the date of receipt of said notice line capacity in said Carthage-Monroe Line, in addition to the requirements of its then existing commitments, available to deliver such increased quantity of gas specified in any such notice at the delivery point herein established." It was further stipulated that if Seller did not have sufficient capacity, it would increase the same as required, provided Mississippi would advance United the funds for making such increase in capacity not to exceed $1,500,000, to be repaid in equal annual installments with interest over the period of the contract. With respect to prices to be paid, it was stipulated: "*For such increased quantities of gas the price provided for in this agreement shall be adjusted by ap-*

propriate revision of the Demand and Commodity Charge, respectively, to compensate Seller for all of Seller's increased cost resulting from such increased capacity." (Emphasis supplied.)

Article 9 of said agreement further provided:

> "Seller shall promptly file a copy of this agreement, *as a rate schedule*, with the Federal Power Commission, *together with such schedules and notices with respect to this agreement and any changes effected thereby as may be required or contemplated by the provisions of the Natural Gas Act and the orders, rules and regulations of said Commission.* Seller shall promptly apply to to the Federal Power Commission for the specific authorization to transport through its said Carthage-Monroe Line and sell the gas required for delivery hereunder.
>
> "This agreement shall not become effective unless (i) the same is permitted to become effective, *as a rate schedule* and without suspension of the rates herein agreed upon, by action or inaction of the Federal Power Commission and (ii) the Federal Power Commission permits Seller to transport through its said Carthage-Monroe Line and sell the full quantities of gas required for delivery hereunder '*as Additional quantities*', as such term is used in paragraph (B) of the Order issued on July 5, 1945, by said Commission in Docket No. G-622." (Emphasis supplied.)

On March 28, 1949, Mississippi notified United of its desire to increase its purchases to 195,000 Mcf per day

beginning November 11th and requested the latter to provide capacity in the Carthage-Sterlington Line accordingly. Thereafter on November 16, 1949, the parties amended their agreement to correspond to this notice and United filed the same with the Commission as "Supplement No. 15 to United's Rate Schedules". This agreement also increased the price of gas from 38¢ (Demand) to 45¢ and from 5¢ to 6.5¢ per Mcf (Commodity), the purpose being to compensate United for its increased investment in pipe line facilities necessary to enable it to deliver this additional 122,000 Mcf per day through the Carthage-Monroe line. In proceeding No. G-1252, before the Commission for a certificate of public convenience and necessity to construct additional facilities to carry it out, this agreement was designated as Exhibit No. 3. On November 16, 1949, United wrote a letter to Mississippi, calling attention to the fact that this agreement [illegible] be supplemented by "a letter agreement", identi[illegible] said proceeding as Exhibit No. 4. The letter also [illegible]:

> "x x x United's representatives further stated that even if the said Exhibits Nos. 3 and 4 became effective *the rates and charges therein provided for would be tentative only and in an appropriate proceeding United would timely ask for a proper revision of the rates and charges provided in said agreements.*
>
> "In order that Exhibits Nos. 3 and 4 may be filed as rate schedules and become effective as such, under the Rules and Regulations of the Federal Power Commission, as they existed prior to December 1, 1948, it will be necessary that

Mississippi River Fuel Corporation and United execute said documents." (Emphasis supplied.)

Copies of exhibits 3 and 4 were enclosed for Mississippi's signature. We also quote from the letter agreement, Exhibit No. 4 (Supplement No. 1 to Supplement No. 15) as follows:

"It is anticipated that the additional gas requested x x x by letter dated March 28, 1949, must be supplied by *United Gas Pipe Line Company by purchase of surplus gas in the Carthage Field.* United is *entering into purchase contracts for the purchase of this surplus gas.* These purchase contracts are for twenty (20) years, and the price to be paid thereunder is on a sliding scale of *7½¢ cents per Mcf* for the first 5-year period, increasing one cent each 5 years to 10½ cents for the final 5-year period.

"*Due to variations in the market demands of both United and others now withdrawing gas from Carthage Field, the amount of surplus gas purchases may, in any year, be less than the amount estimated by United to supply the increased requirements of Mississippi River Fuel Corporation. It is the intention of United, as of March 1st of each year, to make an appropriate adjustment in the commodity charge as set out in its amendatory agreement with Mississippi River Fuel Corporation dated November 16, 1949, in the event that the surplus gas purchases, chargeable to Mississippi River Fuel's increased demand as set out in said agreement, shall be less than 122/195 of Mississippi River Fuel's total requirements from United. The*

amount of the adjustment, and the method of calculation, shall be approved by the Federal Power Commission.

"United also serves from the Carthage Field certain other customers, namely, Texas Eastern Transmission Corporation, Southern Natural Gas Company, and certain local markets. *In the event that United should increase its contractual commitments to Texas Eastern or Southern over that presently in effect or should increase its deliveries from said Field to its local markets over an average daily delivery of 25,000 Mcf, all purchases by United under its surplus gas contracts shall be allocated between the above markets and Mississippi River Fuel Corporation in the proportion that the Mississippi River Fuel Corporation increase bears to all increases over the commitments in effect on March 28, 1949.* For the purpose of this computation, the prior commitment of United to Mississippi River Fuel shall be taken as 73/195 of the increased commitment resulting from the agreement of November 16, 1949.

"If the foregoing is acceptable to you, please so indicate by executing in the space provided below and returning to us the enclosed duplicate hereof." (Emphasis supplied.)

Mississippi signed the contract (Exhibit No. 3) and acknowledged the letter in this form:

"The undersigned hereby acknowledges receipt of the above and foregoing letter with enclosures as therein stated. The undersigned expressly stipulates that nothing done by it in

> connection with Docket No. G-1252 and the execution of this acknowledgment shall in anywise prejudice any rights of the undersigned under that certain contract with United of date September 7, 1945."

The agreement (Supplement No. 15 to Schedules 9, 10 and 11) and the letter (Supplement No. 1 to Supplement No. 15) were also filed with the Commission on November 23, 1949, and on November 27th following were "allowed to take effect as of December 8, 1949" by an order of the Commission which contained a provision:

> "(C) United shall file as of March 1 in each year the amount of the proposed adjustment in the commodity charge, referred to in said Supplement No. 1 to Supplement No. 15, the method of calculation of such adjustment, and such other details as may be requested by the Commission, and such filing shall be made each year whether or not any adjustment is contemplated by United."

During the first months of delivery, December 13, 1949, to February 28, 1950, United purchased no surplus gas in the Carthage Field at 7½¢ per Mcf and on May 23rd filed with the Commission a proposed accounting for that period, showing the amount due Mississippi as $201,893 and requested the Commission's approval. This sum represented the difference between monthly billings of 12,887,462 Mcf of gas delivered at the "rolled-in" rate of 6½¢ per Mcf and 5¢ per Mcf, which United chose to apply, as shown by Exhibit A attached to the letter

dated May 19, 1950, transmitting the proposed settlement to the Commission. In said letter, United gave as its authority for making the adjustment Section (C) (above) which it quoted and the order of the Commission dated December 27, 1949, made effective as of December 8 of the same year. On June 27, 1950, the Commission issued its order approving the settlement again quoting said Section (C) of Supplement No. 1 to Supplement No. 15 and adding:

> "It appears that for the period involved, from December 13, 1949 to February 28, 1950 inclusive, United purchased no gas at a price of 7½ cents per Mcf for delivery to Mississippi River Fuel Corporation, as a consequence of which as an adjustment of $201,893 *is proposed to reflect a reduction in the unit commodity price from 6½ cents to 5 cents per Mcf.*
>
> "Good cause has been shown for permitting the aforesaid supplemental rate schedule to become effective as of December 13, 1949.
>
> "The Commission orders:
>
> "(A) The aforesaid described rate schedule be and it is hereby allowed to take effect at the date designated, and shall be deemed to have been filed and published in compliance with the Natural Gas Act.
>
> "(B) Noting contained in this order shall be construed as a waiver of the requirements of Section 7 of the Natural Gas Act, as amended; nor shall it be construed as constituting approval by this Commission of any service, rate, charge, classification, or any rule, regulation, contract or practice affecting such service or rate provided

for in the above-described Rate Schedule nor shall this order be deemed as recognition of any claimed contractual right or obligation affecting or relating to such service or rate.

"(C) This order is without prejudice to any findings or orders which have been or may hereafter be made by this Commission in any proceeding now pending, or hereafter instituted, by or against the Applicant." (Emphasis supplied.)

During the next period, March 1, 1950, to February 28, 1951, United also purchased no surplus gas from the Carthage Field for delivery to Mississippi, and in its letter to the Commission dated April 24, 1951, after again quoting from the above Supplement No. 1 to Supplement No. 15, and referring to the Commission's order of December 27, 1949, with respect to Supplement No. 15 and Supplement No. 1 to Supplement No. 15, stated that "in compliance" therewith, it enclosed Exhibit A "showing our proposed adjustment and the amount due Mississippi hereunder." United then explained:

"At the time United negotiated Supplement No. 1 to Supplement No. 15, United intended to purchase surplus gas from various producers in the Carthage Field, at a price of seven and one-half cents (7½¢) per Mcf, to supply the additional gas required by Mississippi River Fuel.

"However, various developments in the purchase negotiations influenced United to temporarily abandon its efforts to purchase such surplus gas from the producers; and in lieu of these arrangements, United, in order to obtain additional gas for Mississippi River Fuel, en-

tered into an exchange agreement with Texas Eastern Transmission Corporation, dated April 24, 1950 (Rate Schedule No. 109), under which Texas Eastern agreed to deliver to United in its Carthage-Sterlington line, gas which Texas Eastern had available from its 20" transmission line near Castor, Louisiana, in excess of its own requirements. Texas Eastern charges United for all gas delivered to it under this contract at the rate of seven and one-half cents (7½¢) per Mcf by deducting said amount from the bill for the deliveries by United to Texas Eastern at Longview under the contract between said parties, dated June 20, 1947.

"*Accordingly, the adjustment in the commodity charge to Mississippi River Fuel Corporation has been based on the quantity of gas which United received from Texas Eastern under said contract during the period under consideration, which quantity and the price charged United therefor were then 'rolled in' with the 5¢ price in the same manner as was done to obtain the 6.5¢ commodity charge provided for in said Supplement No. 15.*" (Emphasis supplied.)

The monthly billings disclosed a total of $5,606,022.27 based upon the application of the rate of 5¢ per Mcf to 152,337 Mcf and 7½¢ per Mcf to 42,633 Mcf daily received in exchange with Texas Eastern Transmission Company (called Texas Eastern) on a "rolled in" rate of 6.5¢ per Mcf, and from which it arrived at a "difference from actual billing" of $688,789.81, which United proposed to pay to Mississippi, as a proper adjustment under the terms of the contract and schedules on file

with the Commission heretofore referred to and delineated.

In response to this proposal, the Commission, on May 11, 1951, informed United that the rate of 7½¢ per Mcf applied only to "surplus gas purchased in the Carthage Field" and that the attempt to treat that rate as applicable to gas exchanged with Texas Eastern was "evidently improper and inconsistent with the clear wording of Supplement No. 1 to Supplement No. 15", and United was requested to file an adjustment consistent with said Supplement No. 1, which meant that the price or rate for all gas should not exceed 5¢ per Mcf.

Thereafter, on June 18, 1951, United submitted "Exhibit A revised" setting out the method of calculation of said adjustment and the amount due thereunder. It then explained at length that "while the monetary results are the same x x x, the method of calculation of the 'Rolled In' price has been changed to give effect to the net gas received for the benefit of" Mississippi; that at the hearing to obtain the necessary certificate for "the looping of the line x x x to supply the additional requirements of Mississippi x x x United's testimony was all directed" to the idea "that the additional gas would come from the Carthage Field" as "surplus gas x x x at an original price of 7.5 cents per Mcf for the first five year period"; that United had made every effort to obtain the surplus gas in the Carthage Field, but "various developments influenced" its decision "to temporarily abandon" these efforts. It described those developments as (1) considerable quantities of gas became available from Texas Eastern at the same price of 7½¢ per Mcf

(the source not stated) as surplus gas from other producers; (2) producers insisted United obligated itself to take the full amount of their (producers') allowable less the quantity being taken by other pipe line companies, "a condition under which United could not operate"; and (3) it became apparent that Texas Eastern would have surplus gas during the summer months of 1950. United added that rather than cause hardship to domestic consumers in St. Louis, it made an exchange agreement with Texas Eastern on April 24, 1950 (Rate Schedule No. 109) by which the latter agreed to deliver to United gas in its Carthage-Sterlington line at Castor, Louisiana; and that Texas Eastern charged United for all gas so delivered at the rate of 7½¢ cents per Mcf by deducting said amount from the bill for deliveries by United to Texas Eastern at Longview for the same rate under a contract between the parties dated June 20, 1947. It further explained that the gas so purchased or exchanged with Texas Eastern at 7½¢ per Mcf had been "rolled in" with the 5¢ price in the same manner as was done to obtain the 6.5¢ commodity charge provided in Supplemental No. 15. It therefore requested that the Commission reconsider its decision and render its findings in favor of United's position. In the same communication United further admitted:

> "The entries on United books as far as the adjustment to the Mississippi River Fuel account are concerned show an amount of $1,033,-184.75 as compared to the more realistic figure presented on the attached tabulation of $688,-789.81. It has always been the policy of the Company in such matters as this and other items such as tax matters to set up correctly the maximum possible obligation it may be faced with,

this being no more than a prudent method of operating."

This was followed by certain arguments as to why it was entitled to equitable relief, including the assertion that "Mississippi x x x has said that it does not want this refund for the very simple reason that it will make United an unwilling supplier." It closed with the statement that the rate charged Mississippi for the gas was 6.5¢ per Mcf.

On July 12, 1951, this revised proposal was likewise turned down by the Commission for the same reasons as the first, that is, it was "inconsistent with the aforesaid Supplement" requiring the additional gas be *purchased in the Carthage Field* and could not be supplied at that rate for gas exchanged with Texas Eastern, but that the settlement should be on the same basis as that of February 28, 1950.

Thereafter United on October 3, 1951, filed with the Commission (Docket No. G-1804) a petition for an order declaring it was not due any adjustment at all to Mississippi but was entitled to a refund of the $201,893, paid for the first three months ending February 28, 1950. On October 30th the Commission dismissed this proceeding and United petitioned this Court for review. The Commission moved to dismiss that petition on the ground that under Sub-section (C) of Section 1.7 of the "General Rules and Regulations of the Commission", granting of such declaratory relief was discretionary and its refusal was not dispositive of any right of petitioner. We sustained the motion and dismissed the petition. *United Gas*

Pipe Line Co. v. Federal Power Commission, 203 F.2d 78.

As stated earlier, Mississippi had been allowed to intervene in February, 1952, in the proceeding before the Commission and on December 5, 1952, the Commission's order, Docket No. 2097, was entered and consolidated with No. 2024.

Before the hearing set for January 26, 1953, United on January 15, 1953, filed the required affidavit stating that the only purchase of gas in the Carthage Field during the two annual periods ending February 29, 1952, was from Stanolind Oil and Gas Company, consisting of 3,558,406 Mcf for a total price of $266,880 at an average rate per Mcf of 7½¢, attaching its statement showing the prices paid for all gas. On January 24, 1953, United filed its motion to dismiss both proceedings (Nos. 2024 and 2027) for the same reasons previously stated as to No. 2024 and on the further ground they did not conform to the Administrative Procedure Act and the Commission was without authority and jurisdiction to conduct the investigation which was patently for the purpose of establishing rates retroactively or amending the same, all in violation of the statute. The motion was denied.

An examiner was appointed and conducted a hearing for several days and finally on September 30, 1953, rendered an intermediate report that United was entitled to charge only the 5¢ per Mcf rate since no "surplus" had been purchased for filling the contract with Mississippi in the Carthage Feild. This ruling was affirmed by a majority of the Commission, two members dissenting.

At the hearing, United having taken the position that the Commission had no jurisdiction for the reasons stated, it stood on that defense and offered no evidence other than the information which it was required to produce by the Commission.

United makes some eight specifications of error: (1) that the Commission's holding that the reasonableness of rates was not before it for decision; (2) that it adjudicated the matter without employing the standards of Sections 4 and 5 of the Act; (3) that it failed to hold the 6.5¢ Mcf rate filed and approved by the Commission was the only lawful rate which United could collect until it had been changed by a proper proceeding under said Sections 4 and 5 of the Act; (4) that the Commission's conclusion and order amounted to a retroactive change of rates and reparation, a power "admittedly" beyond its jurisdiction; (5) that it erroneously held Supplement No. 1 to Supplement No. 15 constituted a "formula" rate; (6) that it was error to hold that Supplement 1 to Supplement No. 15 required United as of March 1st of each year to make accountings to the extent that it did not purchase 122,000 Mcf per day of Mississippi's increased requirements as surplus gas in the Carthage Field; (7) that it erred in holding that Supplement No. 1 to Supplement No. 15 could be given effect as a "Purchased Gas Cost" adjustment or as a "non-purchase of gas adjustment"; and (8) erred in holding that United's published rate schedules could be amended, enlarged, clarified or supplemented, or that said omissions and deficiencies could be supplied by estoppel or waived by the conduct of United.

Counsel for the Commission contends (1) that its findings and conclusions "as to import and meaning of United's filed rate schedules" are supported by substantial evidence; (2) the Commission's interpretation thereof is "in accordance with x x x principles of tariff and rate schedule construction"; and (3) said interpretation "does not involve retroactive rate making or reparations."

There is little dispute as to the facts and the questions involved are: (1) did the contracts and amendments thereof filed with the Commission by United constitute rate schedules applicable alone to Carthage surplus gas, or could it use the 7½¢ per Mcf regardless of whether it was "surplus" from the Carthage Field; and (2) whether acquisition of gas by exchange with Texas Eastern was the same thing as purchasing it from producers, where the basis of the exchange between United and Texas Eastern was a contract made in 1947.

We agree with the Commission that the case does not involve, as such, a matter of fixing the rates to be charged between United and Mississippi. The fixing of rates, of course, is one of the functions of the Commission, to be performed in accordance with the provisions of the Act; but the case presents the question of whether what was actually done complied with previously filed rates. Like all other common carriers, pipe line companies are allowed to file their rates, with the consent of the Commission, which become operative until the Commission either on its own initiative or at the instance of interested parties determines to investigate. If an investigation is ordered, newly filed rates can

only apply to the future. Only in this way, after prescribed hearings, can previously filed rates be changed or set aside. Section 717(c) of the Act. *Mississippi Power & Light Co. v. Memphis Natural Gas Co.*, 5 Cir. 162 F.2d 388.

In presenting its rates to the Commission United stated to some extent the factors of enlarging its line, etc., and the prices it would have to pay for the gas; and on that basis it was allowed to file the contract and supplements disclosing the necessity for paying 7.5¢ per Mcf to obtain the additional 122,000 Mcf from surplus gas in the Carthage Field. Both Mississippi and the Commission were justified in assuming therefore that these expenditures would be actually made, and this assumption was further strengthened when United made its first return or report of the amount to be paid for the period ending February 28, 1950. It used the old rate of 5¢ per Mcf applicable to the 73,000 Mcf under the contract before its amendment, and remitted to Mississippi the aforesaid sum of $201,892 for the express reason it had not purchased any surplus Carthage gas at the rate of 7.5¢. This report was approved by the Commission and the amount paid over to Mississippi.

However, in accounting as required by the order of the Commission allowing the filing of Supplement No. 1 to Supplement No. 15, for the next annual period ending March 1, 1951, for the first time it used the rate of 7.5¢ per Mcf as having been paid for the quantity acquired from Texas Eastern. At the same time it disclosed that this rate was based upon a prior agreement made with Texas Eastern in 1947 to exchange gas at that figure and

that it had supplied the additional quantities to Mississippi from that source. It claimed, in effect, that the result under the contract and rates filed was the same as if the gas had been purchased for that price as surplus from the Carthage Field.

The record does not support this contention. In filing the original contract and supplements thereto, United represented to the Commission that it would have to obtain the additional 122,000 Mcf as surplus from the Carthage Field at a price of 7.5¢. The Commission presumably relied upon this representation; otherwise, it would have ordered an investigation before allowing the rates to become effective, and it could have rejected them if found excessive under the circumstances. When it later developed that United was supplying the gas through exchange with Texas Eastern, there was nothing from which the Commission could, without a hearing, inform itself of the actual cost to United of the gas being furnished to Mississippi. Further, it appears that the gas United got from Texas Eastern was received at Castor, a considerable distance inside Louisiana from Carthage, and that United was repaying this gas to Texas Eastern in kind at Longview. Hence, there was the distinst possibility that United was saving considerable transportation expense and might devote part of its enlarged line to the supplying of customers other than Mississippi. In addition, there is the possibility that United might have been exchanging to Texas Eastern gas for which it had paid or was paying much less than 7½¢, thereby deriving a decided advantage over the rate it expected to pay for surplus gas in the Carthage Field. As a matter of fact,

in complying with the Commission's order to furnish information, United disclosed some factors which apparently operated to its advantage. These considerations were left to conjecture when United failed to produce evidence beyond that specifically required by the Commission.

On the other hand, United could easily have avoided any such loss as it now alleges by disclosing this deviation from the terms of its recorded schedules in an amendment filed for the purpose of having the Commission approve the exchange. This it did not do, and its adjustments were the first indication the Commission had that it was not conforming to the recorded procedure. To allow it to pursue the course followed here would have the effect of permitting United to change its own scheduled rates, a power conferred upon the Commission by statute.

Although the determination of rates is a legislative function, it may here be conceded, as United argues, that the statute and equity require the rates to be reasonable and that any possible confiscation may be prevented in a proper jurisdictional case by a writ of injunction issued by a three-judge statutory court. However, that limitation applies to the rate-making power as such and not to the interpretation of an agreement voluntarily made and obligations expressly assumed thereunder. The very nature of this undertaking was such that there could be variations in the quantities of gas supplied and corresponding variations in United's cost. In view of the uncertainties, we can see no reason why the parties should not have agreed, with the Commission's approval, to adjust these matters in the manner provided by the con-

tracts and schedules filed with and approved by the Commission. What the Commission did here was not retroactive rate-making but enforcement of the contract and United's own rate schedule filed with the Commission.

By application of the contract rates, the Commission found that for the entire period involved in this controversy, the sum due from United to Mississippi was $2-836,293.43. United offered no evidence and has directed our attention to nothing which supports a contention that this figure was incorrect. For the reasons stated, the petition to vacate the Commission's order is

DENIED.

A True Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Fifth Circuit.

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SEP 7 1955

HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 302.

UNITED GAS PIPE LINE COMPANY,
Petitioner,

vs.

FEDERAL POWER COMMISSION and MISSISSIPPI RIVER FUEL CORPORATION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT, MISSISSIPPI RIVER FUEL CORPORATION, IN OPPOSITION.

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BRIEF OF RESPONDENT, MISSISSIPPI RIVER FUEL CORPORATION, IN OPPOSITION.

Questions Presented.

1. *Introductory Statement.*

The case does not involve any fixing of rates or change of rates as Petitioner indicates in its presentation of questions. The case involves merely an interpretation of the language of a rate schedule and the enforcement of its terms by requiring United Gas Pipe Line Company (United) to make the accounting adjustment which it had refused to make notwithstanding its clear and unambiguous obligation to do so.

United failed in the Court of Appeals to establish its contention that the contested Order fixed or changes rates.

Nevertheless United presents the questions for consideration in its Petition by assuming as the premise its own rejected views of the point in controversy. Whether the Commission's action and Order under review constituted a fixing or change of rates or merely required obedience to a legally effective rate schedule was the decisive question presented to the Court of Appeals.

2. *Counterstatement of the Questions Presented.*

A contract between two natural gas companies provides that additional gas must be supplied from purchases of surplus gas in a specified field, and the contract and the Order of the Federal Power Commission permitting the contract to take effect as a rate schedule require the seller, as of March 1st each year, to make an appropriate accounting and adjustment, to be approved by the Commission, in the commodity charge in the event that the required surplus gas purchases are less than a specified part of the purchaser's requirements. The seller made no filing to change its obligation to account on that basis. The questions presented are:

> 1. In a proceeding to investigate and determine the amount of any such required adjustment, must the Commission inquire into the justness and reasonableness of the previously ordered accounting and adjustment?
>
> 2. In ordering the seller to make the commodity charge adjustment, did the Commission correctly require the adjustment to be based solely upon purchases of surplus gas from the specified field as provided in the rate schedule?
>
> 3. Did the action of the Commission constitute a retroactive change in rates?

Counter Statement of the Case.

United supplies natural gas to Mississippi River Fuel Corporation (Mississippi) under a contract of long standing. The rates charged are on file with and subject to the Commission's jurisdiction under the Natural Gas Act (The Act) (52 Stat. 822, 15 U. S. C. 717 *et seq.*). By two contract amendments made November 16, 1949 the daily quantity of gas was increased from 73,000 Mcf to 195,000 Mcf, and the price raised from 38¢ to 45¢ demand charge and from 5¢ to 6½¢ commodity charge, with a provision for an adjustment in the commodity charge.[1] The 6½¢ commodity charge was arrived at by pricing the additional 122,000 Mcf of gas at 7½¢ with the 73,000 Mcf at 5¢ per Mcf, giving a weighted average or "rolled-in rate" of 6½¢ (A. 4, 7-8, 34, 120, 121, 127).[2]

The adjustment provision (A. 149-151) is quoted in part in the Petition (p. 7). It recites:

> (a) The anticipation of United that additional gas for Mississippi "must be supplied . . . from purchases of surplus gas in the Carthage Field."
>
> (b) "United is entering into purchase contracts for the purchase of this surplus gas." The initial price was stated to be 7½¢ per Mcf.
>
> (c) The possibility that the amount of surplus gas purchases in any year may be less than the amount estimated by United to be required to supply the additional gas to Mississippi.

---

[1] The contract amendment which contained the 6½¢ commodity charge was designated by the Commission as "Supplement No. 15 to United's FPC Rate Schedules 9, 10 and 11". The contract amendment containing the adjustment provision was designated by the Commission as "Supplement No. 1 to Supplement No. 15 to United's FPC Rate Schedules 9, 10 and 11." They are considered together.

[2] References to the Joint Appendix are "(A.....)."

(d) The intention of United, as of March 1st of each year, to make an appropriate adjustment in the commodity charge of 6½¢ in the event that the surplus gas purchases chargeable to Mississippi's increased demand should be less than 122/195 of Mississippi's total requirements; and

(e) The amount of the adjustment and the method of calculation shall be approved by the Commission.

The Order of the Commission allowing the two agreements to take effect as a rate schedule contained a provision requiring the filing of an adjustment, as of March 1st of each year, containing the method of calculation and such other details as might be requested by the Commission (A. 167). United is in error in alleging in the Petition (pp. 8, 9) that the filing of the required adjustment was treated as a change in rate in the Order of the Commission (A. 166).

The first adjustment was due as of March 1, 1950. United had been able to supply the additional gas to Mississippi without purchasing surplus Carthage gas. Accordingly, United filed on May 23, 1950, for the Commission's approval, a proposed accounting adjustment of $201,893 reflecting no purchases of surplus Carthage gas (A. 172). This adjustment was approved by the Commission, and the amount was paid to Mississippi (A. 39, 40, 171-173). United was authorized to file the adjustment as a supplement to its Rate Schedule, Supplement No. 1 to Supplement No. 15, but United is in error in characterizing the Commission's action as taken under Section 4(d) of the Act (Petition, p. 10).

The adjustment for the second period, i. e. the year ended February 28, 1951, was filed by United but rejected by the Commission (A. 155, 156, 163, 164). In submitting this adjustment, United stated that it had not purchased

surplus gas in the Carthage field, but in order to obtain additional gas for Mississippi, United had made an exchange agreement with Texas Eastern Transmission Corporation obtaining gas from Texas Eastern in United's Carthage-Sterlington line and delivering an equivalent quantity to Texas Eastern at Longview, Texas. United was selling gas to Texas Eastern at Longview at 7½¢ per Mcf, and the accounting for the exchange gas was accomplished by Texas Eastern deducting from the amount due to United for Longview deliveries the total amount computed at 7½¢ for the exchange gas delivered to United (A. 153).

United did not purchase gas at 7½¢ to supply Mississippi and is in error in so stating (Petition, p. 10). The gas delivered to Texas Eastern at Longview was not newly purchased gas and was sold, not purchased, at 7½¢ to Texas Eastern under a contract made in 1947 (A. 151-153), and did not result in an increased cost of purchased gas as United claims (Petition, p. 10). In fact, the entry made on United's books of account reflected a charge of 5¢, the adjusted change held proper by the Commission (A. 3, 42-43, 124, 152).

In making the first two adjustments, United did not make a request for a determination of the justness and reasonableness of the adjusted price. Furthermore, it made no additional filings, but sought, by petition to the Commission, to obtain a Declaratory Order that no adjustment whatever was due (A. 125-130). The Commission dismissed that petition and a review proceeding in the Court of Appeals for the Fifth Circuit was dismissed on Motion of the Commission. *United Gas Pipe Line Company* v. *Federal Power Commission*, 203 F. 2d 78 (1953).

Meanwhile, in a rate proceeding in which Mississippi sought increased rates, the Commission treated the adjust-

ment as though having been made and disallowed as an annual operating expense $1,033,185, being the amount of the adjustment as computed by the Commission for the twelve months ended February 28, 1951. FPC Opinion No. 234, *In Re Mississippi River Fuel Corporation,* 95 PUR NS 435, 449-451 (1952). Since United refused to make the adjustment, Mississippi was compelled to seek relief from the Commission culminating in the Order of the Commission, issued December 23, 1953, requiring United to make the adjustments called forth by the rate schedule, which Order was affirmed by the Court of Appeals.

The adjustment ordered covered the following periods:

For twelve months ending:

February 28, 1951	$1,033,184.71
February 29, 1952	967,646.41
December 31, 1952 (10 months)	835,462.31
Total	$2,836,293.43

No further adjustment was required, since the commodity charge was superseded by a new rate schedule filed by United in July 1952 and made effective January 3, 1953 (A. 22, 23).

ARGUMENT.

I.

The case does not involve an important question of Federal Law not heretofore settled by this Court.

By erroneously stating this case as if a change in rate had been ordered by the Commission without a finding of justness and reasonableness, United seeks to cloak its contentions with an aura of importance to the entire

natural gas industry. That the Commission in a rate proceeding must provide a hearing before finding a rate to be unjust and unreasonable, and then must determine and fix by order the just and reasonable rate, is firmly established by statute and the decisions of this Court and is not involved here. Likewise, the absence of authority in the Commission to fix rates for the past is well established. *Federal Power Commission* v. *Hope Natural Gas Company,* 320 U. S. 591 (1944); *Hope Natural Gas Company* v. *Federal Power Commission,* 196 F. 2d 803 (C. A. 4, 1952).

The case here is otherwise. The Commission did not, as alleged by United, (Petition, p. 13) reserve the right "to re-examine the commodity charge" in an approved rate schedule. What the Commission did was to accept for filing a rate schedule in which United voluntarily agreed to make an annual adjustment in the event of a specified condition and to order United to file as of March 1st of each year the amount of the required adjustment, the method of calculation, and other details if requested (A-167). Such an adjustment is not unusual.[8]

The question of the justness and reasonableness of the 6½¢ commodity charge was not involved and was never at issue. Conformity to the standards of Sections 4 and 5 is not at issue.

This case had its genesis in an obligation founded on contract and reenforced by an appropriate Commission Order. The only point at issue is the enforcement of that obligation. United seeks to avoid that obligation by introducing the phantom issue of justness and reasonableness of the 6½¢ charge and the adjustment. The Commission

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[8] *Re Pennsylvania Water & Power Co.*, 8 FPC 1193, 193 F. 2d 230 (C. A. D. C. 1951), 343 U. S. 414; *In Re Safe Harbor W. P. Corp.*, 5 FPC 221, 179 F. 2d 179 (C. A. 3, 1949), Cert. denied 339 U. S. 957.

and the Court of Appeals recognized the limited character of the proceeding, and the dissenting Commission minority only wanted gas purchases other than surplus gas from the Carthage field to be taken into consideration in making the accounting adjustment (R. 125).[4]

All concerned, except United, are of one accord that this proceeding was an interpretation and enforcement of an accounting adjustment clause in a duly filed rate schedule. Important as the case is to United and Mississippi, the scope of that importance does not extend further.

II.

The Decision Below Was Correct.

Findings of the Commission as to the facts, if supported by substantial evidence, are made conclusive by the Act (Section 19(b)). In making the finding that United's rate schedule provided for an adjustment only on the basis of purchases of surplus gas from the Carthage field, in the event that such purchases should be less than 122/195 of Mississippi's requirements, the Commission was supported by these uncontradicted facts:

1. United made a binding agreement to make the adjustment in the commodity charge stated in the contract of November 16, 1949, if surplus gas purchases from the Carthage field turned out to be less than the amount estimated (A. 149-151).

2. This agreement became effective as a legal rate schedule under the Natural Gas Act (A. 165-168).

3. A Vice President of United had testified in a previous proceeding that the adjustment was based on surplus gas purchases (A. 129-130).

---

[4] References to the printed record are abbreviated (R.).

4. United did not make Carthage surplus purchases as it had stated it would do (A. 10).

5. The Commission expert who supervises the analysis and review of rate matters (A. 15) and whose qualifications were conceded (R. 257) testified:

(i) That the adjustment provision was part of United's effective rate structure (A. 20-21, 29, 31-32);

(ii) No reparations were involved (R. 54);

(iii) The schedule was certain (A. 55) and the adjustment was determinable (A. 70) and the scope of the formula was set forth (A. 70);

(iv) Year-end adjustments were not at all unusual under the Natural Gas Act (A. 34, 49, 56-57) and, in fact, United had other schedules providing for such adjustments (A. 57-61).

If United desired an inquiry into the reasonableness of its 6½¢ charge, the way was open to it by filing a new rate schedule. Lacking such a filing, the Commission was not authorized to pass upon the justness and reasonableness of the 6½¢ charge. *Northern Natural Gas Company* v. *Federal Power Commission*, 215 F. 2d 176 (1954). If the Commission had acceded to United's demands and determined and fixed some other rate in substitution for the 6½¢ charge subject to adjustment, there would then have occurred the retroactive rate fixing of which United complains. Upon United's refusal to comply with the rate schedule, the Commission found the amount of the adjustment. There was no fixing of any rate past or future. The legally effective rate remained at 6½¢ subject to adjustment until changed by the subsequent United filings (A. 22, 23).

Conclusion.

This case presents no points of widespread interest or importance. It does not involve an important question of Federal law not heretofore settled by this Court, and the Order of the Commission and the judgment of the Court of Appeals affirming the Order were correct. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 302

UNITED GAS PIPE LINE COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION AND MISSISSIPPI RIVER FUEL CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion and order of the Federal Power Commission (R. 117–130)[1] are unreported. The opinion of the Court of Appeals (R. 159–180) is reported at 220 F. 2d 706.

JURISDICTION

The judgment of the Court of Appeals was entered on March 25, 1955 (R. 181). A petition

[1] "R." refers to the Transcript of Record in the Court of Appeals, "J. A." to the Joint Appendix filed in the Court of Appeals. Both have been filed by petitioner in this Court.

for rehearing filed by petitioner was denied on May 12, 1955 (R. 209). The petition for a writ of certiorari was filed on August 8, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1) and Section 19 (b) of the Natural Gas Act.

QUESTION PRESENTED

Whether the Court of Appeals properly approved the Federal Power Commission's construction of the rate schedules filed with it by United Gas Pipe Line Company for its sales of natural gas to Mississippi River Fuel Corporation as requiring year-end accounting adjustments in the charges made by United.

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act (52 Stat. 821, 15 U. S. C. 717, *et seq.*) are set forth in the Appendix, *infra*, pp. 22–25.

STATEMENT

a. *The basic contracts and rate schedules.*— Petitioner, United Gas Pipe Line Company, is engaged in the transportation and sale of natural gas. Respondent, Mississippi River Fuel Corporation, operates a pipeline from the Louisiana and Texas gas fields to St. Louis, Missouri, supplying, among others, consumers in that city and in surrounding areas (R. 160).

In September 1945, United and Mississippi entered into a contract whereby United agreed

to sell to Mississippi a maximum of 73,000 Mcf of natural gas per day, at a two-part rate consisting of a demand charge of 38¢ per month per Mcf of demand and a commodity charge of 5¢ per Mcf (R. 63–65, J. A. 132). Under Article 6 of this agreement Mississippi was permitted to increase its purchases from United; in this event, however, the demand and commodity charges were to be revised, in order to compensate United for increased costs resulting from the delivery of the increased quantities (J. A. 134–135). This agreement was filed with the Federal Power Commission and permitted to become effective as Supplement 11 to United's F. P. C. Rate Schedules Nos. 9, 10, and 11 (R. 63).

On March 28, 1949, Mississippi notified United in accordance with Article 6 of their contract that it desired to increase its maximum daily purchases from 73,000 Mcf to 195,000 Mcf per day—an increase of 122,000 Mcf per day—commencing November 1, 1949 (R. 64, J. A. 137–138).

Thereafter, on November 16, 1949, United and Mississippi entered into an amendatory agreement, providing for the maximum daily delivery of 195,000 Mcf to Mississippi (J. A. 139–144).[2]

[2] Pursuant to its application filed August 10, 1949, under Section 7 of the Natural Gas Act, United was issued a certificate of public convenience and necessity for the construction and operation of additional pipeline capacity to supply Mississippi's increased requirements (J. A. 126–127).

Subject to the Commission's approval, the demand charge was increased from 38 to 45¢ per Mcf of demand (J. A. 141), and the commodity charge from 5 to 6½¢ per Mcf,[3] on United's representations that 122,000 Mcf per day "must be supplied by" United "from purchases of surplus gas in the Carthage Field" (J. A. 149), where "the going market price of gas * * * is 7½¢" (J. A. 121), and that United was entering into 20-year contracts "for the purchase of this surplus gas" at a price of "7½ cents per Mcf for the first 5-year period, increasing one cent each 5 years to 10½ cents for the final 5-year period" (J. A. 149). United represented that the 6½¢ rate was not intended to constitute a rate increase (J. A. 121), but that its purpose was merely to reflect any purchases of surplus gas in the Carthage field at 7½¢ and that it did not want any more than that (J. A. 112).

In order to obtain Commission approval of these rates without suspension and without the delay which would have resulted from a possible investigation into their reasonableness under Sections 4 (d) and 4 (e) of the Natural Gas Act, United and Mississippi, on the same day, November 16, 1949, entered into a supplementary

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[3] The weighted average of 73,000 Mcf at 5¢ per Mcf, and 122,000 Mcf at 7½¢ per Mcf, or a "rolled-in rate" of 6½¢ per Mcf (J. A. 4, 7–8, 34, 120, 121, 127).

agreement[4] (J. A. 97, 112, 144–147). After reciting the representations already described, this agreement provided (J. A. 150):

> Due to variations in the market demands of both United or others now withdrawing gas from Carthage Field, the amount of surplus gas purchases may, in any year, be less than the amount estimated by United to supply the increased requirements of Mississippi River Fuel Corporation. It is the intention of United, as of March 1st of each year, to make an appropriate adjustment in the commodity charge * * * in the event that the surplus gas purchases, chargeable to Mississippi River Fuel's increased demand * * * shall be less than 122/195 of Mississippi River Fuel's total requirements from United. The amount of the adjustment, and the method of calculation, shall be approved by the Federal Power Commission.

United simultaneously filed the two November 16 agreements with the Commission as Supplements—Supplement No. 15 and Supplement No. 1 to Supplement No. 15—to its F. P. C. Rate Schedules 9, 10 and 11 (R. 64). The Commission's single order allowing both Supplements to

[4] The agreement took the form of a letter from United to Mississippi, the latter company signifying its acceptance by signature of its president in a space provided therefor at the end of the letter (J. A. 151).

become effective provided, *inter alia* (J. A. 167–168):

> (C) United shall file as of March 1 in each year the amount of the proposed adjustment in the commodity charge, referred to in said Supplement 1 to Supplement 15, the method of calculation of such adjustment, and such other details as may be requested by the Commission, and such filing shall be made each year whether or not any adjustment is contemplated by United.

b. *The operation of the adjustment provision and the origin of the instant dispute.*—In May 1950, United advised the Commission that during the period ending February 28, 1950, it had not purchased any surplus gas from the Carthage field for delivery to Mississippi (J. A. 172); accordingly, "in compliance with said Paragraph (C)," *supra,* United filed a proposed accounting adjustment in the amount of $201,893 for the period and requested Commission approval (J. A. 169–170). This amount represented the difference between monthly billings for 12,837,462 Mcf of gas delivered during the period at the "rolled-in rate" of 6½¢ per Mcf and the same volumes of gas at 5¢ per Mcf (J. A. 170). The Commission approved the adjustment and United paid the $201,893 to Mississippi (R. 56, J. A. 39–40, 171–173).

In the next period, March 1, 1950, to February 28, 1951, inclusive, as in the preceding period,

United purchased no surplus gas in the Carthage Field for delivery to Mississippi (J. A. 3, 42–43, 124, 152). However, the adjustment submitted by United on April 24, 1951, in the amount of $688,789.81 (J. A. 151–154), was not based on the application of the 5¢ per Mcf charge to the volumes of gas delivered in the period. It was based, instead, on the application of the 5¢ charge to 152,337 Mcf per day (J. A. 154) and a 7½¢ charge to 42,663 Mcf per day (J. A. 154), representing gas received by United from Texas Eastern Transmission Corporation under an exchange agreement between them. Under the exchange agreement United was permitted to return such gas to Texas Eastern "in kind."

The Commission thereupon advised United that the rate of 7½¢ per Mcf was applicable only to "surplus gas purchases in the Carthage Field" and that United's proposal "to construe exchange gas received from" Texas Eastern as "surplus gas purchased in the Carthage Field" is "evidently improper and inconsistent with the clear wording of your Supplement No. 1 to Supplement No. 15" (J. A. 156). United was, therefore, requested to file an adjustment consistent with the provisions of Supplement No. 1 (J. A. 156).

In response United, on June 18, 1951, submitted a substitute adjustment (J. A. 157–162). United continued, however, to treat exchange gas

from Texas Eastern as surplus gas purchased in the Carthage Field, although this time the 7½¢ per Mcf was applied to 39,864 Mcf per day, the net quantity of gas received by United from Texas Eastern (J. A. 157, 159, 162). While it conceded that the "exchange gas" was "not purchased as 'surplus gas' in the Carthage Field," United nevertheless insisted that it (J. A. 159)

> * * * was in effect purchased from Texas Eastern at Castor at the same price as would have been paid for the Carthage gas, [and that] the Staff should reconsider its decision on this matter and render its findings in favor of United's position.[5]

The Commission rejected the substitute adjustment and again advised United that it was based "on an improper construction of, and was inconsistent with, the provisions of" Supplement No. 1 to Supplement No. 15 (J. A. 163–164). United made no further filings, although called on by the Commission to do so (J. A. 47, 173–174).[6]

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[5] On its books, however, United set up a contingent liability to Mississippi of $1,033,184 (the amount found proper by the Commission (R. 57, J. A. 46)), based on a charge of 5¢ per Mcf for all gas delivered (J. A. 160).

[6] On October 4, 1951, United filed with the Commission a petition for a declaratory order that Mississippi was entitled to no adjustment and that United was entitled to a refund from Mississippi of the amount of $201,893 previously paid to Mississippi in accordance with United's voluntary adjustment approved by the Commission (J. A. 125, 130). By order dated October 30, 1951, the Commission dismissed United's petition. Following denial of United's

c. *The inception of the instant proceedings.*— On August 4, 1952, Mississippi filed a "Petition for Relief" (R. 3–12) with the Commission asking that United be ordered "to make such accounting or render such report or reports as will indicate as of March 1, 1951 and March 1, 1952" the appropriate adjustments in the commodity charge for gas purchased by Mississippi from United (R. 7). Mississippi alleged that United had failed to make or report the adjustments required by its filed rate schedules (R. 6) and that in "the absence of positive and definitive action and decision by" the Commission, "Mississippi is not in a position * * * to recover any amounts due therefrom or to determine whether in fact any amounts are due from" United (R. 7).

On December 5, 1952, the Commission issued its order (R. 22–30), substantially reciting the above facts, whereby it instituted an investigation to enable it to determine "the correct amount of the adjustment in the charges of United to Mississippi for natural gas sold and delivered * * * under the provisions of United's Rate Schedules FPC Nos. 9, 10 and 11 and supplements thereto; and to determine such amount as may be due and

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application for rehearing, United sought review in the Court of Appeals for the Fifth Circuit; that court dismissed the case without prejudice on the ground that United was not aggrieved by the order of the Commission. *United Gas Pipe Line Company* v. *Federal Power Commission*, 203 F. 2d 78 (C. A. 5).

payable from United to Mississippi." The Commission in its order instituting the investigation also consolidated that proceeding with the petition for relief filed by Mississippi.

Hearings were held before a Presiding Examiner. In addition to continuing its claim that the "exchange" gas should be treated as "surplus" gas within the meaning of Supplement 1, United urged that the adjustment provisions of this Supplement were illegal as providing a retroactive rate change, and accordingly that the 6½¢ rate established in Supplement 15 was the sole applicable rate. United did not present evidence, however, that no adjustment was required under the rate schedules (J. A. 12), preferring to rest on its contention that the Commission was without jurisdiction over the subject matter (J. A. 13). The only testimony as to the meaning of the rate schedule was presented by a Commission staff witness, whose qualifications as a rate expert were conceded.

d. *The decisions below.*—The Presiding Examiner, interpreting Supplement No. 1, found that the 7½¢ rate was applicable solely to surplus natural gas purchased by United in the Carthage Field (R. 61–62, 65–67).[7] He also found that

[7] With reference to United's claim that there was no supply of "surplus" gas in the Carthage field after it filed the Supplements, the Examiner noted that this contention was made "[n]otwithstanding its [United's] solemn declaration that it is entering into 20-year purchase contracts for gas in that field (Supp. No. 1 to Supp. No. 15, p. 1)" (R. 59).

United had not *purchased* surplus gas from Texas Eastern at 7½¢ per Mcf, but that the gas was obtained under an exchange arrangement in which the 7½¢ charge constituted merely a "bookkeeping entry" which was counterbalanced in United's books by the entry of a credit for a like amount when gas was returned to Texas Eastern (R. 68–69). He held, further, that the adjustment provisions under Supplement No. 1 did not constitute an unauthorized reparation or redetermination of a filed rate, but a year-end accounting adjustment made in accordance with a filed and effective rate schedule (R. 69). In conclusion, he found that Mississippi was entitled to an aggregate adjustment of $2,836,293.43 (R. 71–72).[8]

The Commission affirmed the Presiding Examiner's decision (R. 117–119). Supplementing the Examiner's opinion, the Commission held that Supplement No. 15 and Supplement No. 1 thereto together constituted a single complete rate schedule and that the 6½¢ "rolled in" commodity rate set out in Supplement No. 15 constituted the basis

[8] This total adjustment covered a period of 34 months, as follows:

For the 12 months ended February 28, 1951	$1,033,184.71
For the 12 months ended February 29, 1952	967,646.41
For the 10 months ended December 31, 1952	835,462.31
	2,836,293.43

for tentative monthly billings, subject to final adjustment at the year-end on the basis of the 5¢ and 7½¢ rates depending on the source of the gas (R. 118). It further held that the issue of the reasonableness of the rates was not before it: "we are now only performing the duty given to us by Supplement No. 1 to Supplement No. 15, which provides, that: '* * * the amount of the adjustment, and the method of calculation shall be approved by the Federal Power Commission' " (R. 119). Two Commissioners dissented (R. 120–128).

The Court of Appeals affirmed (R. 159–180). It agreed that the case did not involve the fixing of rates to be charged Mississippi by United but only the issue whether there was compliance with rates previously filed by United (R. 176). It held that the construction of the rate schedules, limiting the 7½¢ rate to surplus gas obtained from the Carthage field, was correct in view of the circumstances in which the schedules were filed and of their practical interpretation by United itself (R. 177). It also rejected United's contention that the exchange gas from Texas Eastern was *purchased* at the rate of 7½¢, pointing out that this gas was merely exchanged and that, due to United's failure to submit any evidence, the record did not indicate what the actual cost was (R. 178–179). Assuming, however, that the cost of the Texas Eastern ex-

change gas was in excess of 5¢, the court pointed out that United's remedy was to file a new rate schedule, not to attempt a retroactive rate change under the guise of equitable relief (R. 179). The court concluded that Supplement No. 1, which United had filed voluntarily after reaching agreement with Mississippi, did not constitute retroactive rate making since it had been designed merely as a means of taking into account the variations in the sources and quantities of gas supplied and corresponding variations in United's costs (R. 179–180).

ARGUMENT

The issues raised by the petition revolve around the construction of Supplement No. 15 and Supplement No. 1 thereto, voluntarily filed by United with the Commission. These issues, we submit, were correctly decided against petitioner by the Presiding Examiner, the majority of the Commission, and the unanimous court below. In any event, since the case involves only the construction of a particular tariff, drafted to meet the peculiar needs of United and Mississippi, review by this Court is not warranted.

1. Petitioner attacks the Commission's result on the ground that the Commission went beyond its statutory authority in that it (1) granted a retroactive rate change, and (2) did so without making findings as to the reasonableness of the existing rate and without holding hearings

thereon.[9] But no such action by the Commission was involved in this case. In issuing its order, the Commission was not fixing new rates for the past or the future, but rather was directing United to comply with the existing rate schedules on file with it. As construed by the Commission, with the approval of the court below, the import of Supplement No. 15, and Supplement No. 1 thereto, was that on an annual basis United's charge would be 5¢ per Mcf, except for surplus gas from the Carthage Field, for which the rate would be 7½¢ per Mcf; interim payments were to be made on a monthly basis at a "rolled-in" rate of 6½¢ per Mcf, but these payments were to be adjusted at the end of each year in light of the actual figures as to the source of the gas delivered to Mississippi.

This construction of the Supplements accords not only with their plain language (*supra,* p. 5), and United's representations made to the Commission at the time of their filing (*supra,* p.

[9] The order of December 5, 1952 (*supra*, pp. 9–10), instituting the present proceedings, cited as the basis of its authority the rate schedules filed by United and the Supplements thereto, in particular Supplement No. 1 to Supplement No. 15, and the Order of December 20, 1949, par. C (*supra*, p. 6) requiring United to file the amount of the annual adjustment with the Commission (cf. R. 25, 28, 29). This sufficiently answers the argument that the order of investigation is silent as to the legal authority and jurisdiction under which the Commission was proceeding (cf. Pet. 15).

4), but also with United's own understanding for at least two years thereafter. On May 23, 1950, six months after the Supplements became effective, United filed an accounting adjustment for the period ending February 28, 1950, which reflected full agreement with the Commission's reading of the Supplements; since no surplus gas had been purchased in the Carthage Field at 7½¢ per Mcf during this period, United's proposed adjustment computed charges for all deliveries to Mississippi at 5¢ per Mcf. *Supra,* p. 6. The same understanding as to the basic nature and purpose of the Supplements underlay United's actions with regard to the second adjustment period, for while United sought at this time to have the 7½¢ rate applied to exchange gas from Texas Eastern as well as surplus gas from the Carthage Field, it recognized that even if its proposed substitution was accepted, an accounting adjustment was still to be calculated under the provisions of Supplement No. 1. *Supra,* pp. 6–8.[10] Since the adjustments ordered by the Commission were designed to require United to comply with existing rate schedules as thus understood by United, the Commission's action plainly did not involve retroactive rate fixing or the

[10] It should also be noted that United's books showed an adjustment to Mississippi in the amount of $1,033,184.75, for this period, the exact amount of adjustment determined by the Commission. *Supra,* p. 8, fn. 5.

reasonableness of the rate level.[11] And, although rates providing for year-end adjustments are not in general usage, there would appear to be little doubt that where the circumstances justify such a provision, the Commission is authorized to sanction it. See *Pennsylvania Water and Power Co.*, 8 F. P. C. 1193, affirmed, 193 F. 2d 230 (C. A. D. C.), affirmed, 343 U. S. 414; *Safe Harbor Water Power Corp.*, 5 F. P. C. 221, affirmed, 179 F. 2d 179 (C. A. 3), certiorari denied, 339 U. S. 957.

2. There is no merit in United's contention that the Supplements violate Section 154.38 (d) (3) of the Commission's Rules and Regulations. That section, relating to the manner of statement of rate schedules to be filed with the Commission, provides, in effect, that no escalator clause, adjustment clause or periodic change provision shall be included in a filed rate schedule where its result is "to effect the modification or change of any

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[11] Even if Supplement No. 1 were void, as United urges, this would not help United. That Supplement, together with Supplement No. 15, constitutes a single rate schedule, as the Commission expressly found. Both deal with the same subject matter, were dated the same day and filed together, and were allowed by the Commission in a single order. In addition, the record is clear that the Commission would not have approved Supplement No. 15 without Supplement No. 1 (J. A. 112, 144–147). Hence, if Supplement No. 1 were void, Supplement No. 15 would likewise be invalid and the 5¢ rate of Supplement No. 11 (*supra*, p. 3) would be applicable.

rate or charge specified in the rate schedule, or the substitution therefor of any other rate or charge * * *." Designed to preclude modifications in filed rates or charges except in the manner provided by Section 4 of the Natural Gas Act, the regulation prohibits any automatic change in rates or terms and conditions of service.

The Supplements here involved do not provide for an automatic change in rates or the terms and conditions of service. The year-end adjustment of Supplement No. 1 was purely of an accounting nature. The total charges to be paid by Mississippi to United were dependent upon the amount, if any, of United's purchases of "surplus gas" in the Carthage Field, and the adjustment was to be made when all facts respecting such purchases were determined. The Supplements contemplated that the 195,000 Mcf to be supplied by United to Mississippi daily were to be charged at 5¢ per Mcf for 73,000 Mcf and 7½¢ per Mcf for the remaining 122,000 Mcf, to the extent that such 122,000 Mcf were supplied from surplus gas purchases in the Carthage Field. Otherwise, the total daily supply of 195,000 Mcf was to be charged at 5¢ per Mcf.[12] Rates were mathe-

[12] Significantly, United, in its letter of November 22, 1949, to the Commission (J. A. 118–123), transmitting the agreements that became Supplement No. 15 and Supplement No. 1 thereto, explained that the 7½ per Mcf for 122,000 Mcf per day was proposed because it represented "the going market

matically translated into a rolled-in-rate of 6½¢ per Mcf, *supra,* p. 4, fn. 3, for monthly billing purposes, subject, however, to application of the component rates, as of March 1st of each year, to the appropriate quantities supplied from each source, when those sources became known at the end of the adjustment year. It is, therefore, clear that the "surplus gas" adjustment provided by Supplement No. 1 did not provide or effectuate any modification or change in the rattes or charges contrary to Section 154.38 (d) (3) of the Commission's rules.

3. United complains, finally, that the adjustment clause in Supplement No. 1 should not be read, as written, to provide a 7½¢ rate only for surplus gas obtained from the Carthage Field, but should be read to include in addition the gas which United received from Texas Eastern.

The Commission's interpretation, however, is plainly in accord with United's original explanation of the reasons and purposes of the rate schedule. *Supra,* pp. 4–6. Moreover, it does not result in any inequity. The Commission and the court below found that the Texas Eastern gas acquired by United was not purchased, but was

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price of gas in the Carthage Field," and further stated (J. A. 121):

> United feels that this situation does not present an increase in rate, and if there be any appearance of such, it is the result of using a so-called "rolled-in rate."

received on an exchange basis, that the 7½¢ United charged itself for this gas was merely a bookkeeping entry, and that the true cost of this gas to United could not be ascertained from the record because of United's refusal to submit any evidence.[13] In any event, as the court below properly pointed out, United had merely to file a new rate schedule if it believed that its costs had risen since the time when the Supplements had become effective. There was no need or justification for an "equitable" interpretation departing from the plain terms of the rate schedule actually in effect.

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[13] In rejecting United's contention that exchange gas should be treated as surplus gas from the Carthage field, the court below stated (R. 178):

> The record does not support this contention. In filing the original contract and supplements thereto, United represented to the Commission that it would have to obtain the additional 122,000 Mcf as surplus from the Carthage Field at a price of 7.5¢. The Commission presumably relied upon this representation; otherwise, it would have ordered an investigation before allowing the rates to become effective, and it could have rejected them if found excessive under the circumstances. When it later developed that United was supplying the gas through exchange with Texas Eastern, there was nothing from which the Commission could, without a hearing, inform itself of the actual cost to United of the gas being furnished to Mississippi. Further, it appears that the gas United got from Texas Eastern was received at Castor, a considerable distance inside Louisiana from Carthage, and that United was repaying this gas to Texas Eastern in kind at Longview. Hence,

In this regard, it is noteworthy that Supplement No. 1 was not unilaterally imposed upon United by administrative action; the Supplement originated as an offer by United to Mississippi, accepted by the latter, and permitted to become effective by the Commission. Consequently, United is hardly in a position to urge that the adjustment provisions of Supplement No. 1 are illegal and inequitable, and that it should therefore be given the benefit of the 6½¢ rate of Supplement No. 15 alone. This point seems especially clear in light of the fact that, as we have shown above, the Commission would not have approved Supplement No. 15 without at least substantial inquiry and delay in the absence of the adjustment provisions in Supplement No. 1 (cf. *supra*, pp. 4–5, 16, fn. 11).

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there was the distinct possibility that United was saving considerable transportation expense and might devote part of its enlarged line to the supplying of customers other than Mississippi. In addition, there is the possibility that United might have been exchanging to Texas Eastern gas for which it had paid or was paying much less than 7½¢, thereby deriving a decided advantage over the rate it expected to pay for surplus gas in the Carthage Field. As a matter of fact, in complying with the Commission's order to furnish information, United disclosed some factors which apparently operated to its advantage. These considerations were left to conjecture when United failed to produce evidence beyond that specifically required by the Commission.

CONCLUSION

For the above reasons the petition for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX

The Natural Gas Act (52 Stat. 821, 15 U. S. C. 717 *et seq.*) provides in pertinent part:

> Sec. 4. * * * (d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.
>
> (e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with

such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided,* That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. * * *

Sec. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and

reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

* * * * *

Sec. 14. (a) The Commission may investigate any facts, conditions, practices, or matters which it may find necessary or proper in order to determine whether any person has violated or is about to violate any provision of this Act or any rule, regulation, or order thereunder, or to aid in the enforcement of the provisions of this Act or in prescribing rules or regulations thereunder, or in obtaining information to serve as a basis for recommending further legislation to the Congress. The Commission may permit any person to file with it a statement in writing, under oath or otherwise, as it shall determine, as to any or all facts and circumstances concerning a matter which may be the subject of investigation. The Commission, in its discretion, may publish in the manner authorized by section 312 of the Federal Power Act, and make available to State commissions and municipalities, information concerning any such matter.

* * * * *

Sec. 16. The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this Act. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this Act; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

CERTIORARI DENIED